

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Implementation of Section 207 of	)	MB Docket No. 05-89
the Satellite Home Viewer Extension	)	
and Reauthorization Act of 2004	)	
	)	
Reciprocal Bargaining Obligations	)	



**REPLY COMMENTS**

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## I. Introduction and Summary

In its Reply, ACA addresses the Comments of NBC Telemundo License Co. (“NBC”), the ABC, CBS, FBC, and NBC Television Affiliate Associations (“Affiliates”), and the National Association of Broadcasters (“NAB”). Specifically, ACA shows that:

- The good faith negotiation obligation in Section 325(b) prohibits market exclusivity provisions in network affiliate agreements. NBC’s claim that network affiliates are free to enter into market exclusivity agreements is therefore incorrect.
- Contrary to the conclusion reached in Affiliates’ and NAB’s Comments, the fact that out-of-market stations have no must-carry rights does not mean that out-of-market stations do not have to bargain in good faith for retransmission consent.

Further, ACA’s Reply shows that the good faith bargaining obligation applies in all markets, local and distant alike.

**The American Cable Association.** ACA represents nearly 1,100 independent cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. More than half of ACA’s members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets.

## **II. Section 325(b) prohibits market exclusivity provisions in network affiliate agreements**

In its Comments, NBC maintains that its affiliates may enter into agreements with NBC that prevent the affiliates from granting out-of-market retransmission consent. NBC bases this conclusion on its argument that the good faith negotiation obligation does not apply to out-of-market signals because SHVIA was expressly intended to protect the property rights of networks and the “free-market” negotiations between program providers and local stations.<sup>1</sup> NBC further claims that Section 325(b) does not apply to agreements between networks and their affiliates.<sup>2</sup>

NBC ignores the plain language of Section 325(b), the legislative history of SHVIA, the Commission’s implementing regulations,<sup>3</sup> and that today’s retransmission consent market is the antithesis of a free market. In fact, in a prior docket, NBC itself took the position that network affiliate exclusivity provisions violate the good faith negotiation obligation.<sup>4</sup>

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<sup>1</sup> *Comments of NBC Telemundo License Co.* (“NBC Comments”) at 2.

<sup>2</sup> *Id.* at 4 (“[Congress] did not mention, address or otherwise intend this provision to interfere with the private contractual dealings among program providers and stations”).

<sup>3</sup> 47 C.F.R. § 76.65.

<sup>4</sup> The *SHVIA Implementation Order* states, “NBC proposes...that extrinsic evidence of an understanding with a third party that the negotiating party will not enter into a retransmission consent agreement, should also evidence violations of the good faith negotiation requirement.” *SHVIA Implementation Order* at ¶ 35.

**The express statutory language.** Section 325(b)(3)(C)(ii) expressly applies to all commercial broadcast stations, local and distant alike, prohibiting “a television broadcast station that provides retransmission consent from engaging in exclusive contracts for carriage or failing to negotiate in good faith...” (emphasis added). There is no language limiting this obligation to a “local” television broadcast station. Where Congress has made a distinction between local and distant stations, it is in the plain language of the statute.<sup>5</sup>

Accordingly, the Media Bureau has reached the conclusion that the good faith negotiation obligation applies to both in-market and out-of-market stations, stating, “[W]e caution broadcasters to be aware of existing contractual obligations that affect a television station’s ability to negotiate retransmission consent in good faith. The statute appears to apply equally to stations and MVPDs in the same local market or in different markets.”<sup>6</sup>

**The legislative history and the Commission’s implementing regulations.** In enacting Section 325(b), Congress intended to create a “marketplace” for retransmission consent: “It is the Committee’s intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals.”<sup>7</sup> There can be no “marketplace” when an MVPD can acquire a network

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<sup>5</sup> See, e.g., 17 U.S.C. § 111 (cable compulsory copyright license); 17 U.S.C. § 119 (DBS compulsory copyright license).

<sup>6</sup> *Monroe, Georgia Water Light and Gas commission, d/b/a Monroe Utilities Network v. Morris Network, Inc., Owner of WMGT, Channel 41, Macon, Georgia, et al.*, CSR Nos. 6237-C and 6254-C, *Memorandum Opinion and Order*, 2004 WL 1661042 (rel. July 27, 2004), note 24.

<sup>7</sup> Senate Committee on Commerce, Science and Transportation, S.Rep. No. 92, 102d Cong., 1<sup>st</sup> Sess. (1991) at 36.

signal from only one station because of the market exclusivity provisions in network affiliate agreements, much less a “free market.”

The *SHVIA Implementation Order*<sup>8</sup> makes clear that these exclusivity provisions violate the good faith negotiation obligation:

[A] broadcaster is prohibited from entering into an agreement with any party a condition of which is to deny retransmission consent to any MVPD.... It is impossible for a broadcaster to engage in good faith negotiation with an MVPD regarding retransmission consent when it has a contractual obligation not to reach an agreement with that MVPD.<sup>9</sup>

The Commission did not limit this statement to local markets, or to agreements between a station and an MVPD. On the contrary, this edict applies to “any party” and “any MVPD.”

Further, the Commission’s rules on good faith negotiation are not limited to local markets or to agreements between a station and an MVPD. Section 76.65(b)(1) of the Commission’s rules states:

The following actions or practices violate a broadcast television station's duty to negotiate retransmission consent agreements in good faith:

vi) Execution by a television broadcast station of an agreement with any party, a term or condition of which, requires that such television broadcast station not enter into a retransmission consent agreement with any multichannel video programming distributor...

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<sup>8</sup> *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, *First Report and Order*, 15 FCC Rcd. 5445 (2000).

<sup>9</sup> *Id.* at ¶ 45 (emphasis added).

In summary, Section 325(b) and the Commission's implementing regulations prohibit exclusivity provisions between a network and an affiliate that restrict the affiliate from granting retransmission consent in any market.<sup>10</sup>

**III. The fact that out-of-market stations have no must-carry rights does not mean that out-of-market stations do not have to negotiate in good faith for retransmission consent.**

Affiliates and NAB conclude that out-of-market stations have no obligation to negotiate in good faith because the stations have no must-carry rights.

Affiliates sum up the argument as follows: "Because there are no MVPD obligations to retransmit and no broadcaster obligations to grant retransmission consent to permit carriage, it follows that there cannot be any good faith bargaining obligations to attempt to come to an agreement that neither the MVPD nor the broadcast station has any legal obligation to enter into."<sup>11</sup> NAB's Comments endorse this reasoning.<sup>12</sup>

If Affiliates' logic were correct, no station – not even a local station - would have an obligation to negotiate in good faith. Because even a local station electing retransmission consent has no obligation to grant retransmission consent. It only has an obligation to bargain in good faith for retransmission

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<sup>10</sup> See also *In the Matter of Petition for Rulemaking to Amend 47 C.F.R. §§ 76.64, 76.93, and 76.103, Retransmission Consent, Network Non-Duplication, and Syndicated Exclusivity, Petition of the American Cable Association*, RM-11203 (March 2, 2005) at 14-17.

<sup>11</sup> *Comments of the ABC, CBX, FBC, and NBC Television Affiliate Associations* at 5.

<sup>12</sup> *Comments of the National Association of Broadcasters* at 2-3.

consent.<sup>13</sup> Similarly, an MVPD has no obligation to retransmit that station because when a local station elects retransmission consent, it forgoes its must-carry rights for that election period.<sup>14</sup> If an obligation to contract were a requirement for the good faith bargaining obligation to apply, even a local station would have no obligation to bargain in good faith.

But Congress has enacted the good faith negotiation obligations in Section 325(b). The obligations must apply whether or not there is a must-carry right.

#### **IV. Conclusion**

The statutory language and legislative history of Section 325(b) are clear. The good faith negotiation obligation applies to stations in all markets, local and distant alike.

Respectfully submitted,

**AMERICAN CABLE ASSOCIATION**

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<sup>13</sup> 47 U.S.C. § 325(b)(3)(c)(ii).

<sup>14</sup> 47 U.S.C. § 325(b)(4).